

E480

.H83

20

3

Houston, Sam
"

To the Members of the honorable Senate of the United States:

ESTATE OF DR. J. M. BEST, deceased,

vs.

THE UNITED STATES.

BRIEF ON CLAIM FOR PROPERTY CONDEMNED AND APPROPRIATED
TO THE USE OF THE UNITED STATES, AT PADUCAH, KY., DURING
THE WAR OF THE LATE REBELLION.

The property claimed for was a large three-story house, with its contents and surroundings, situated one hundred and fifty yards from Fort Anderson, in Paducah, Ky. The house was of brick masonry, well and strongly built, and had nine windows and doors opening in the direction of the fort, from the third story of which destructive work on the lives of the garrison in said fort could have been prosecuted.

This property was condemned by order of Brigadier-General Charles F. Smith, commanding the post of Paducah, Ky., in the fall of 1861, while Fort Anderson was being constructed, on account of its proximity to the fort, to prevent its being used against the fort by an enemy assaulting the fort, and to give open range to the guns of the fort. A board of survey was appointed by General Smith to value and remove or cause the removal of said property.

The fort was located and constructed while the house was standing and occupied by Dr. Best, its owner, with knowledge of the advantage to the enemy the house in the hands of an attacking enemy would give, and the danger it would be to the fort. For proof of which see affidavits of Brigadier-General E. A. Paine and Major-General John McArthur, now on file with the claim.

This property was appropriated to the use of the United States by destroying it pursuant to the written order of Colonel S. G. Hicks, of the Fortieth Illinois regiment, United States volunteers, while commanding the post of Paducah,

E 480
.H83

Ky., and the garrison in Fort Anderson on the 26th day of March, 1864.

It was destroyed by order of the commanding officer because of its close proximity to said fort, to prevent its being used by the enemy as a cover for their near approach unobserved to the fort, and to prevent its being used by the enemy in their operations against the fort in an expected attack on the fort which at the time was believed from information received by the commanding officer, and from observation made by him, to be imminent and menacing, when no battle was in progress, or commenced on that day, or afterwards, at that place.

At the time of said expected attack, and at the time said property was destroyed, the garrison in said fort consisted of only six hundred and fifty men, and the ammunition, on examination, was found to be short.

The order for said destruction was not given until the commanding officer became *satisfied* from his own observation and from information that the enemy were in the immediate neighborhood, and concentrating for an attack on said fort with a force of five thousand men.

Before the order for its destruction was given, and while information of the *certainty* of the *expected attack* had been received, it was *agreed* by all the officers in the fort, *including the commanding officer*, that the destruction of this house, *to prevent the capture of the fort, and to secure the safety of the garrison*, as the result of said expected attack *was a necessity*. The *expected attack*, however, was not made in consequence of the retreat of the enemy. See affidavit of Capt. E. L. Chapman and statement of Hon. L. S. Trimble.

Dr. Best was a loyal citizen of the United States, and an ardent supporter of the Union and the Government from the first inception of troubles in 1861 to the close of the war; a citizen and a resident of a loyal State, and the property appropriated was situated in a loyal State. For proof of all which see copy of Colonel S. G. Hicks' order dated March 26, 1864; also, Colonel Hicks' affidavit; also, affidavits of Major Geo. F. Barnes, Captain Thos. P. Carter, Captain E. L. Chapman, Sergeant Wm. D. James and Brig. Gen'l E. A. James.

Also statement of Hon. L. S. Trimble.

The relative situation of the fort and house, the nature and character of the grounds and the value of the property, is shown by a diagram and the affidavits of numerous witnesses on file with the claim.

Wm. Jackson
July 9, 20

Afterwards, on the 30th day of October, 1864, in expectation of another attack on Fort Anderson, the standing walls of Dr. Best's house were pulled down and levelled as near as could be with the ground, by order of Brigadier-General Sol. Meredith, then commanding the post of Paducah, and the bricks were taken possession of by Colonel McBride, of the 8th regiment U. S. C. A., (II) and Colonel Lawrence of the 34th New Jersey regiment, and used to construct chimneys for their soldiers' tents during the winter of 1864-'5. For proof of which see affidavit of Colonel McBride and his letter to Senator Cole; also, affidavit of Captain E. L. Chapman; also, certificate of Brigadier-General Sol. Meredith on file with the claim.

The fundamental laws of the Government do not confer jurisdiction on the courts to try this character of cases, nor does any law of Congress now in force. The *Congress* is the *only* tribunal which has authority to pass upon and cause the payment of this claim. Hence the appeal to Congress.

This being the state of facts, the principles governing them as found in Vattel's "Law of Nations" reads as follows:

"Is the State bound to indemnify individuals for damages they have sustained in war? We may learn from Grotius that authors are divided on this question. The damages under consideration are to be distinguished into two kinds, those done by the State itself or the sovereign, and those done by the enemy. Of the first kind, some are done deliberately and by way of precaution, as, when a field, a house or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart or any other piece of fortification, or when his standing corn or his store-houses are destroyed to prevent their being of use to the enemy. Such damages are to be made good to the individual who should bear only his quota of the loss." See Vattel's "Law of Nations," p. 402.

Any diversity of opinion which may have existed in the time of Grotius cannot affect the right of citizens of the United States to just compensation for private property taken for public use; because that right is clearly expressed in the Constitution of the United States, and reads thus: "Nor shall private property be taken for public use without just compensation." See amendments to the Constitution, art. 5. That right has been adjudicated by the superior courts of the country, and that right has often been acted upon by the Congress of the United States.

Vattell, the learned writer on international law, further says: "But it is perfectly consistent with the duties of the state and sovereign, and, of course, perfectly equitable, and even strictly just to relieve, as far as possible, those unhappy sufferers who have been ruined by the ravages of war." See Vattell's Law of Nations, page 403.

The condemnation and destruction of Dr. Best's property, however, was *not* ravages of war.

The location and construction of a Government fort, by the authorized officers of the Government, in such immediate vicinity of the house as to cause the existence of the house to *endanger* the safety of the fort and garrison, was a *deliberate act*.¹ The several examinations of the fort in process of construction, the grounds surrounding it and the approaches to it, the examination of the house, the several consultations concerning it between the commanding officers, and the order condemning it were *deliberate acts*. The consultation between the commanding officer and other officers in Fort Anderson, on the 26th of March, 1864, the conclusion to burn said house and the written order to burn it, were *all deliberate acts*, considered and performed by way of *precaution* and to *prevent* said property from being taken possession of and *used* by the *enemy* of the United States against a fort and garrison of the United States.

In a well-matured and carefully prepared judgment, the Court of Claims, in the case of William S. Grant *vs.* The United States, for property destroyed at Tucson, Arizona, have adjudged the law of the United States in this character of cases to be that

"The taking of private property for use or for destruction, when the public exigency demands it, by a military officer commanding any part of the public forces, is an exercise of the right of eminent domain.

"Whenever the officer is justified the Government is liable. The state of the facts as they appeared to the officer when he acted must govern the decision.

"There is no discrimination to be made between property taken to be *used* and property taken to be *destroyed*." See Court of Claims Reports, vol. I, p. 41, Wm. S. Grant *vs.* The United States.

The court held in that case, that the destruction of Grant's property at Tucson *was a taking for public use*. See *Ibid.*, p. 50.

The law authorized the court to adjudge Grant compensa-

tion for his property destroyed at Tucson. Now what difference in principle is there between the destruction of Wm. S. Grant's property at Tucson, and the condemnation and destruction of Dr. J. M. Best's property at Paducah. The claimant thinks the case at Paducah is more strongly in favor of claimant's right to compensation than the case at Tucson; because W. S. Grant was an army contractor, and went to the post in the army and there established his business. In doing so he assumed, to some extent, the risks incident to the business he had voluntarily engaged in. Dr. Best built his residence in a retired place, where and when no risk surrounded or danger threatened him, and was in the quiet enjoyment of the same. The army post went to Dr. Best's locality, and built their fort almost in the shadow of Dr. Best's residence, with a full knowledge and appreciation on the part of the Government of the danger the house would be to the fort in case of an assault by the enemy, and as a *precautionary measure*, to avert *this danger brought about by the act of the Government*, condemned the house as being dangerous to the existence of the fort and the safety of its garrison, and *for this reason destroyed the house and its contents*. Colonel Hicks, at the time he caused the destruction of this property, was acting under and by virtue of a commission from the Government, and was commanding a part of the public forces. In obedience to the orders of his superior officers he was holding an army post of the Government, and caused the destruction of said property when no battle was in progress, but in expectation of an attack from an enemy with an army greatly superior in numbers to his own, in order to make his hold secure. This act was caused to be done by the commanding officer in the discharge of the functions properly pertaining to the office which he held, and was an exercise of the right of eminent domain. "The obligation to make compensation is co-extensive with the right of the State to take private property for public use, and whenever it is taken by competent authority the obligation of the State cannot be evaded." See *Ibid.*, p. 47.

Was Colonel Hicks justified in destroying the property of Dr. Best?

"Whenever the officer is justified, the liability of the public is established." See *Ibid.*, page 47.

At the time of the destruction of this property a terrible war had been progressing in the United States for nearly

three years. Fort Anderson was situated on the border of the territory held by the United States, and was liable to be assailed on any day and was actually assaulted on March 25th, 1864, and after two or three hours' fighting the assailants withdrew. The holding of this fort and post *was necessary* to maintain the line of the United States army in prosecuting the war, to secure to them the navigation of the Ohio, Tennessee and Cumberland rivers, and to prevent inroads on the territory then held by them.

On the 26th of March, 1864, Colonel Hicks, the commanding officer in said fort, from information received and from personal observation made by him, *believed* that the fort was to be attacked by an army of five thousand men, and that said attack was *imminent and menacing*; and while the commanding officer was making an estimate of all the resources at his command, and calculating all the advantages that would be against him in the effort to successfully resist said expected attack, and knowing that the garrison in said fort consisted of only six hundred and fifty men, and learning from the ordnance officer's report and other sources that the ammunition was short, it was deliberately agreed by the commanding officer and other officers in said fort that one of the most effective means of resisting said expected attack was the destruction of this property. But the expected attack was not made.

Colonel Hicks was not placed in command at Fort Anderson to surrender on the appearance or threatened appearance of an enemy. If he had done so he would have been liable to court-martial. (See 52d Article of War.) He was put there *to hold the fort*, and to use all the means in his power *necessary to do so*. From information and observation he deemed the destruction of this property *one of the means necessary*. "In deciding upon the necessity, however, the state of facts as they appeared to the officer, at the time he acted, must govern the decision, for he must necessarily act upon the information of others, as well as his own observation; and if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is imminent and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser. See 13th Howard, U. S. S. C. reports, pages 134-5. Also 1st Court of Claims reports, pages 48-9.

If Colonel Hicks had been guilty of *wanton* destruction of property he was liable to court-martial and severe punishment.

He was never court-martialed, never charged or even censured with having done anything wrong in his management of affairs at, or in his defense of Fort Anderson. At the close of the war he was honorably discharged from the service of the Government. If he had been guilty of a great public wrong, and in so public a manner would he not have been dealt with for it? He was not dealt with, but his act was ratified by the Government; therefore he is justified and the liability of the Government is fixed.

This claim has never been adversely reported by any committee having charge of it.

In the Forty-second Congress a bill providing for its payment passed the Senate, but reached the House late in the session and was not acted upon for want of time. See Congressional Globe, part I, 3d session, Forty-first Congress, page 319.

From all which the conclusions are—

1. That Dr. Best's property was *private* property.
2. That by the authority of the Government *it was taken for public use.*
3. That by the standard authors on international law, by the Constitution of the United States and the adjudications of the superior courts thereunder, and by the precedents established in Congress the Government *is bound to make just compensation for it.*

MAGGIE HOUSTON, *executrix of the estate of Dr. J. M. Best, deceased.*

By SAM HOUSTON, *Attorney.*



Afterwards, on the 30th day of October, 1864, in expectation of another attack on Fort Anderson, the standing walls of Dr. Best's house were pulled down and levelled as near as could be with the ground, by order of Brigadier-General Sol. Meredith, then commanding the post of Paducah, and the bricks were taken possession of by Colonel McBride, of the 8th regiment U. S. C. A., (II) and Colonel Lawrence of the 34th New Jersey regiment, and used to construct chimneys for their soldiers' tents during the winter of 1864-'5. For proof of which see affidavit of Colonel McBride and his letter to Senator Cole; also, affidavit of Captain E. L. Chapman; also, certificate of Brigadier-General Sol. Meredith on file with the claim.

The fundamental laws of the Government do not confer jurisdiction on the courts to try this character of cases, nor does any law of Congress now in force. The *Congress* is the *only* tribunal which has authority to pass upon and cause the payment of this claim. Hence the appeal to Congress.

This being the state of facts, the principles governing them as found in Vattel's "Law of Nations" reads as follows:

"Is the State bound to indemnify individuals for damages they have sustained in war? We may learn from Grotius that authors are divided on this question. The damages under consideration are to be distinguished into two kinds, those done by the State itself or the sovereign, and those done by the enemy. Of the first kind, some are done deliberately and by way of precaution, as, when a field, a house or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart or any other piece of fortification, or when his standing corn or his store-houses are destroyed to prevent their being of use to the enemy. Such damages are to be made good to the individual who should bear only his quota of the loss." See Vattel's "Law of Nations," p. 402.

Any diversity of opinion which may have existed in the time of Grotius cannot affect the right of citizens of the United States to just compensation for private property taken for public use; because that right is clearly expressed in the Constitution of the United States, and reads thus: "Nor shall private property be taken for public use without just compensation." See amendments to the Constitution, art. 5. That right has been adjudicated by the superior courts of the country, and that right has often been acted upon by the Congress of the United States.

Vattel, the learned writer on international law, further says: "But it is perfectly consistent with the duties of the state and sovereign, and, of course, perfectly equitable, and even strictly just to relieve, as far as possible, those unhappy sufferers who have been ruined by the ravages of war." See Vattel's Law of Nations, page 403.

The condemnation and destruction of Dr. Best's property, however, was *not* ravages of war.

The location and construction of a Government fort, by the authorized officers of the Government, in such immediate vicinity of the house as to cause the existence of the house to *endanger* the safety of the fort and garrison, was a *deliberate act*. The several examinations of the fort in process of construction, the grounds surrounding it and the approaches to it, the examination of the house, the several consultations concerning it between the commanding officers, and the order condemning it were *deliberate acts*. The consultation between the commanding officer and other officers in Fort Anderson, on the 26th of March, 1864, the conclusion to burn said house and the written order to burn it, were *all deliberate acts*, considered and performed by way of *precaution* and to *prevent* said property from being taken possession of and *used by the enemy* of the United States against a fort and garrison of the United States.

In a well-matured and carefully prepared judgment, the Court of Claims, in the case of William S. Grant *vs.* The United States, for property destroyed at Tucson, Arizona, have adjudged the law of the United States in this character of cases to be that

"The taking of private property for use or for destruction, when the public exigency demands it, by a military officer commanding any part of the public forces, is an exercise of the right of eminent domain.

"Whenever the officer is justified the Government is liable. The state of the facts as they appeared to the officer when he acted must govern the decision.

"There is no discrimination to be made between property taken to be *used* and property taken to be *destroyed*." See Court of Claims Reports, vol. I, p. 41, Wm. S. Grant *vs.* The United States.

The court held in that case, that the destruction of Grant's property at Tucson was a taking for public use. See *Ibid.*, p. 50.

The law authorized the court to adjudge Grant compensa-

tion for his property destroyed at Tucson. Now what difference in principle is there between the destruction of Wm. S. Grant's property at Tucson, and the condemnation and destruction of Dr. J. M. Best's property at Paducah. The claimant thinks the case at Paducah is more strongly in favor of claimant's right to compensation than the case at Tucson; because W. S. Grant was an army contractor, and went to the post in the army and there established his business. In doing so he assumed, to some extent, the risks incident to the business he had voluntarily engaged in. Dr. Best built his residence in a retired place, where and when no risk surrounded or danger threatened him, and was in the quiet enjoyment of the same. The army post went to Dr. Best's locality, and built their fort almost in the shadow of Dr. Best's residence, with a full knowledge and appreciation on the part of the Government of the danger the house would be to the fort in case of an assault by the enemy, and as a *precautionary measure*, to avert *this danger brought about by the act of the Government*, condemned the house as being dangerous to the existence of the fort and the safety of its garrison, and *for this reason destroyed the house and its contents*. Colonel Hicks, at the time he caused the destruction of this property, was acting under and by virtue of a commission from the Government, and was commanding a part of the public forces. In obedience to the orders of his superior officers he was holding an army post of the Government, and caused the destruction of said property when no battle was in progress, but in expectation of an attack from an enemy with an army greatly superior in numbers to his own, in order to make his hold secure. This act was caused to be done by the commanding officer in the discharge of the functions properly pertaining to the office which he held, and was an exercise of the right of eminent domain. "The obligation to make compensation is co-extensive with the right of the State to take private property for public use, and whenever it is taken by competent authority the obligation of the State cannot be evaded." See *Ibid.*, p. 47.

Was Colonel Hicks justified in destroying the property of Dr. Best?

"Whenever the officer is justified, the liability of the public is established." See *Ibid.*, page 47.

At the time of the destruction of this property a terrible war had been progressing in the United States for nearly

three years. Fort Anderson was situated on the border of the territory held by the United States, and was liable to be assailed on any day and was actually assaulted on March 25th, 1864, and after two or three hours' fighting the assailants withdrew. The holding of this fort and post *was necessary* to maintain the line of the United States army in prosecuting the war, to secure to them the navigation of the Ohio, Tennessee and Cumberland rivers, and to prevent inroads on the territory then held by them.

On the 26th of March, 1864, Colonel Hicks, the commanding officer in said fort, from information received and from personal observation made by him, *believed* that the fort was to be attacked by an army of five thousand men, and that said attack was *imminent and menacing*; and while the commanding officer was making an estimate of all the resources at his command, and calculating all the advantages that would be against him in the effort to successfully resist said expected attack, and knowing that the garrison in said fort consisted of only six hundred and fifty men, and learning from the ordnance officer's report and other sources that the ammunition was short, it was deliberately agreed by the commanding officer and other officers in said fort that one of the most effective means of resisting said expected attack was the destruction of this property. But the expected attack was not made.

Colonel Hicks was not placed in command at Fort Anderson to surrender on the appearance or threatened appearance of an enemy. If he had done so he would have been liable to court-martial. (See 52d Article of War.) He was put there *to hold the fort*, and to use all the means in his power *necessary to do so*. From information and observation he deemed the destruction of this property *one of the means necessary*. "In deciding upon the necessity, however, the state of facts as they appeared to the officer, at the time he acted, must govern the decision, for he must necessarily act upon the information of others, as well as his own observation; and if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is imminent and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser. See 13th Howard, U. S. S. C. reports, pages 134-5. Also 1st Court of Claims reports, pages 48-9.

H83

LIBRARY OF CONGRESS



0 013 701 776 3

permalife.
pH 8.5